Michaelmas Term
[2016] UKPC 32
Privy Council Appeal No 0033 of 2015

JUDGMENT

Arorangi Timberland Limited and others (Appellants) *v* Minister of the Cook Islands National Superannuation Fund (Respondent) (Cook Islands)

From the Court of Appeal of the Cook Islands

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Sumption
Lord Toulson

JUDGMENT GIVEN ON

17 November 2016

Heard on 6 and 7 April 2016

Appellants	*Respondent*
Dr Gerard McCoy QC Timothy Arnold Zoe McCoy (Instructed by Tim Arnold PC)	Michael Ruffin David James (Instructed by Crown Law Office (Cook Islands))

LORD NEUBERGER AND LORD MANCE

Introductory

1. This is an appeal brought by seven appellants against a decision of the Cook Islands' Court of Appeal (Williams P, Barker and Paterson JJA), reversing the first instance decision of Weston CJ, who held that the superannuation scheme set up by the Cook Islands' National Superannuation Act 2000 ("the 2000 Act") was unconstitutional and therefore invalid. The respondent to the appeal is the Minister of Cook Islands' National Superannuation Fund ("the Minister").

2. Prior to 2000, the only forms of financial support for retired people provided by the Cook Islands' Government were (i) a universal old age pension for all those over 60 years of age (which the Court of Appeal described as "very modest"), and (ii) a pension under a defined benefit scheme which was limited to public servants, and which had been closed to new entrants since 1995. During the 1999 general election, the New Alliance Party's manifesto included a policy for establishing a national superannuation scheme for all employed Cook Islanders.

3. After the general election, this policy was then implemented through the presentation to Parliament by the new Government of a Bill ("the Bill") which in due course became the 2000 Act. The 2000 Act set up a National Superannuation Fund ("the Fund") to which contributions were to be made by employees and employers, and from which superannuation payments were to be made.

4. The appellants raise two principal arguments to challenge the validity of the 2000 Act. The first is that the 2000 Act, or the Scheme established pursuant to that Act, is invalid as it involves a taking or deprivation contrary to article 40(1) and/or 64(1)(c) of the Cook Islands Constitution ("the Constitution"). The second principal argument is that section 53 of the 2000 Act is unjustifiably discriminatory contrary to article 64(1) of the Constitution. At first instance, in a judgment given on 31 January 2014, the Chief Justice accepted both these arguments, but on appeal, in a judgment of the court given on 17 November 2014, the Court of Appeal rejected them - [2014] CKCA 4.

The factual, statutory and constitutional background

The 2000 Act

5. The Court of Appeal helpfully set out at [2014] CKCA 4, para 14 the main features of the 2000 Act. With a couple of omissions (which are more comments than descriptions) and with a few small additions and alterations, that summary is as follows:

(a) The compulsory nature of contributions to the Fund. The membership of the Scheme set up by the 2000 Act ("the Scheme") and, thus, an obligation to contribute to the Fund is compulsory for every person who is in employment in the Cook Islands or whose employment is outside the Cook Islands while the employer is resident in the Cook Islands and for every employer in respect of an employee who is so employed - see section 36 of the 2000 Act.

(b) The quantification of contributions to the Fund. The Scheme was phased in and, once it applied to an employee's class of employment, the contributions were calculated as a percentage of the employee's earnings. For one year following the date on which the Scheme becomes applicable to a class of employees, the employer and employee are both required to pay 3% of the employee's earnings. That percentage rises to 4% in the second year and thereafter 5% per annum. These rates may be amended by Order-in-Council in accordance with a recommendation of the Board and the Trustee - see section 39 of the 2000 Act.

(c) National Superannuation Board ("the Board"). The Board comprises five members. One is the Financial Secretary of the Cook Islands who is to be a permanent member while the other four are nominees of particular interest groups. Those groups are the Cook Islands' Workers Association Inc, the Cook Islands' Chamber of Commerce Inc, the private sector employers who are not members of the Chamber of Commerce, and one member nominated by contributors to represent them. Only one member of the five member Board has any association with the Cook Islands' Government - see section 4(2) of the 2000 Act.

(d) The Board's functions. The initial function of the Board was to prepare a Trust Deed ("the Trust Deed") to establish the Fund. Other functions include the appointment and removal of the Trustee administering the Scheme under the Act ("the Trustee"), enforcing collection and payment of contributions to the Fund, monitoring the performance of the Trustee under the Trust Deed, advising the Trustee and reporting to and advising the Minister as the Minister requires. The usual obligations of members of the Board to act in good faith, with reasonable

care, diligence and skill and with honesty and integrity are stated in the Act - see sections 11 and 12 of the 2000 Act.

The Trust Deed

(e) The obligation to prepare the Trust Deed rested with the Board and not the Government. The Board was required to appoint the initial Trustee and to submit the Trust Deed to the Minister and provide him with a certificate from the Chairman of the Board certifying that the Trust Deed was not inconsistent with the 2000 Act. Under section 16 of the 2000 Act certain provisions were mandatorily to be included in the Trust Deed. They included obligations:

(i) To establish the Fund;

(ii) To appoint the initial Trustee;

(iii) To provide for the conditions of entry of members to the Fund;

(iv) To provide for the conditions as to termination of membership of the Fund;

(v) To provide for the conditions under which benefits become payable and the way in which the benefits are to be determined;

(vi) To provide for the circumstances in which the Fund may be wound up, and the way in which the assets of the Fund are to be distributed in the event of a winding up;

(vii) To contain no restrictions on the Trustee's powers of investment other than which is provided in section 19 of the 2000 Act;

(viii) To subject the Trustee to all equitable duties and responsibilities that a trustee has at law;

(ix) To provide for separate accounts for each contributor;

(x) To give the Trustee power to borrow money for the purposes of making any investment or paying any benefit or meeting any liability or for the purpose of management of the Fund;

(xi) To give the Trustee power to enter into any insurance or reinsurance contract relating to the payment pursuant to the Fund of any pension or other benefits contingent on the death or survival of human life; and

(xii) To provide for the remuneration and reimbursement of expenses of the Trustee, investment manager and agents.

(f) The Trustee. The Trustee must be a company under the Trustee Companies Act 1967 (New Zealand) or the Public Trust Office Act 1957 (New Zealand), or an independent professional corporate trustee of similar standing and experience in the trusteeship of superannuation schemes or plans. The Trustee must be appointed by the Board which has the power to replace a Trustee. Another provision requires the Trustee to be appointed "following a transparent and contestable process" - see sections 2 and 11 of the 2000 Act.

(g) The investment of the Fund. The Trustee is responsible for investing the Fund on a prudent commercial basis consistent with best practice portfolio management. It is required each year to provide to the Board its investment strategy for the year which is to include the Trustee's expectation as to risk and return and anticipated specific investments and class of investments. Under section 19 of the 2000 Act, the Board does have a power to direct the Trustee to invest the Fund:

(i) To meet the Government's expectation as to the Fund's performance, including the Government's expectation as to risk and return;

(ii) Not to invest in a specified investment or class of investments to which the Crown already has a direct or indirect exposure, for the purpose of limiting the exposure; and

(iii) To invest a proportion of the Fund not exceeding 20% within the Cook Islands.

(This direction can only be given after consultation with the Minister).

(h) Amendment of Trust Deed. The Board has the right after consultation with the Trustee to rescind, alter or add to any of the provisions of the Trust Deed. However, an amendment is not adversely to affect a contributor's right or claim to benefits or the amount of those benefits that have accrued up until the date of the amendment without the consent of the contributor, unless the amendment is required to comply with the Act or is solely to correct a mistake which has advantageously altered a contributor's right or claim to accrued benefits of the amount of those accrued benefits - see section 21 of the 2000 Act.

(i) Taxation. By virtue of section 27 of the 2000 Act, the Trustee on behalf of the Fund and the Fund are exempt from income tax. An employer's contribution is deductible for tax purposes and an employee pays tax on the employee's contribution to the Fund. Benefits received by a member are free of tax in the hands of the member.

(j) Transfer between Funds. An employee who was in an existing superannuation fund may cease contributions to that fund if the fund so permits and transfer the employee's benefit in the fund to the Fund. If the employee's existing superannuation fund does not permit withdrawal of funds to enable them to be transferred to the Fund, the employee is exempted from the provisions of the Act and is not obliged to be a contributor in the compulsory scheme.

(k) Withdrawal. The only right to withdraw before reaching retirement age is where a person is resident in the Cook Islands for the sole purpose of being employed under a contract of service of not more than three years. If such a person so elects, he or she receives a refund of the employee contributions on the person's permanent departure from the Cook Islands. The employer's contributions are not paid to the employee but are transferred to the reserve account within the Fund. However, such a person may not make such an election, in which case he or she will retain the investments vested in them and will in due course receive a (no doubt very modest) pension in the same way as an employee who is a permanent resident of the Cook Islands - see section 53 of the 2000 Act.

(l) Where a beneficiary ceases to make contributions, the amount standing to his credit shall continue to accrue interest until it is applied to provide a benefit from the Fund - see section 54.

(m) Benefits not available. Unless provided in the Act or the Trust Deed, in no event may any benefit be assigned or charged or attached or passed to any

creditor or a contributor by operation of law. Nor shall any money payable on the death of any contributor be assets for the payment of the deceased contributor's debts or liabilities - see section 63.

6. So far as Government influence over the management and investment of the Fund is concerned, the Court of Appeal referred to the fact that, when speaking to the second reading of the Bill in November 2000, the Deputy Prime Minister said that the 2000 Act had been "designed to be completely above board and completely independent of Government interference" - see *Cook Islands Hansard* 23 November 2000 at 825. The Court of Appeal then said this, which has not been challenged on this appeal:

> "One of the Board's functions is to 'report to and to advise the Minister, as the Minister requires'. There is no general provision requiring the Board to comply with any Ministerial instruction or advice. There is the investment power … where[by] the Board may, after consultation with the Minister, direct the Trustee to invest in certain funds. This is not an obligation to comply with any direction which the Minister may give and some of the restrictions on the exercise of this particular power suggest that they are designed to ensure that the Fund is not put at risk. The only provision which may carry an inference that the Government expects a certain type of investment is the requirement [referred to in para 5(g)(iii) above] to invest a proportion of the Fund not exceeding 20% within the Cook Islands. Once again, the restriction of 20% may be said to be designed to protect the Fund but at the same time give some impetus to local investment for the sake of the economy.
>
> There is a right for the Minister with the concurrence of Cabinet to make representations to the Board in respect of the general policy of the Government as that policy may affect the Fund and which is not inconsistent with the Act or the Trust Deed. The Board is then required to consult with the Minister and may, but is not obliged to, have regard to any such representation. Such representation must be conveyed to the Board and Trustee in writing by the Minister. It must be tabled in Parliament within 14 sitting days of the representation being made and the response being provided to the Minister."

7. The Court of Appeal also gave this "overview" of the 2000 Act, which the Board considers to be accurate:

> "The Act contains the essential elements of the Scheme which is operated by a Board in accordance with the terms of the Trust Deed. It is a compulsory defined contribution Scheme with very limited rights of withdrawal before an employee reaches the age of retirement. The contributions of both the employer and the employee become the property of the employee. The limits on investing in the Cook Islands may be intended to reduce the possibility of making unwise investments similar to some past investments made by the Government [of the Cook Islands] …"

The Trust Deed

8. The Trust Deed contemplated by the 2000 Act (as described in para 5(e) above) was executed by the Board and the Public Trustee of New Zealand, which is now called the Public Trust, on 19 September 2001. The Public Trustee, which remains the trustee, is based in New Zealand and the judge unsurprisingly described it as "a highly reputable trustee" (judgment, para 86) in a passage quoted by the Court of Appeal ([2014] CKCA 4, para 59).

9. The Court of Appeal helpfully summarised the terms of the Trust Deed, at [2014] CKCA 4, para 16, and the Board again adopts the summary, with modifications:

(a) Contributors' accounts are dealt with in clauses 15-17.

(i) A member has a compulsory account and if the member elects he or she may also have a voluntary additional account. At the time the member is entitled to a pension, that member might also have a pension account. The mandated contributions of the employer and the employee go into the member's compulsory account.

(ii) A member's compulsory account is fully vested in the member - clause 69. There is no such provision relating to the member's voluntary account. A member's compulsory account shows the balance vested in that member after crediting mandated contributions of both the employee and the employer, any amount transferred from another superannuation fund, any insured benefit which may be credited to that member, less any insurance premium paid on behalf of the member in accordance with the terms of the Trust Deed and an amount determined by the Trustee, subject to the consent of the Board, to be debited and paid to the reserve account to meet fund expenses.

(iii) In addition, the balance will be adjusted either positively or negatively annually with an amount calculated by applying the appropriate crediting rate for the Fund account. The "crediting rate" is in effect based on the Fund's performance and the value of their assets. Because the crediting rate may be negative and there will be deductions for managing the Fund and paying an insurance premium on behalf of the member, a member's interest in the Fund may be less than the combined contributions of the member and the employer.

(b) Pension accounts are dealt with in clause 20. When an employee is entitled to a benefit and retires the balance in the compulsory account is transferred to a pension account and used to provide a pension that may also be used to buy an annuity for the employee. After acquiring an actuarial report the Trustee in consultation with the Board may increase or reduce the pension factor and may make other alterations to the benefits payable to a member.

(c) Reserve accounts are dealt with in clauses 27 and 28. There is provision for both a general reserve account and a pension reserve account. Funds may only be transferred to those reserve accounts, which may only be transferred from a member's compulsory account to meet the expenses of the Fund.

(d) Benefits payable are described in clauses 42-46. Subject to some specified exceptions, benefits are payable by way of pension. If the balance of a member's compulsory account is less than $25,000, it may be paid as a lump sum. Apart from that, a member entitled to a pension may elect to take a cash sum of up to one-quarter of the balance in the member's compulsory account. Benefits are usually paid when a member reaches normal retirement age, provided a member has not received earlier benefits from the Fund. There are provisions for earlier payment for total and permanent disablement and provisions for payment on the death of a member. There are also provisions for payment of a spousal benefit and payment of an insurance benefit in the case of premature death.

(e) A trustee's indemnity is contained in clauses 79-81. The Trustee is indemnified against all liabilities and expenses incurred in the execution of its duties and will have a first and paramount lien on the Fund for such indemnity. The indemnity will not be available if the Trustee or a director of the Trustee fails to act in good faith or honestly in a matter concerning the Fund, or the acts or omissions of the Trustee or of that director are the

result of wilful or negligent default or wilful or negligent breach of trust or the dishonesty or fraud of any of its directors, officers or other persons or persons appointed by the manager.

(f) Powers of investment are identified in clause 94. The powers of investment vested in the Trustee are extensive and it has the same powers it would have as a beneficial owner of the Fund. These powers are subject to the provisions of the Act including the power of the Board after consultation with the Minister to make the directions referred to in para 5(g) above.

(g) Dissolution of the Fund is covered by clause 117. The Fund dissolves if it no longer has any members or on a date the Board determines in consultation with the Trustee and Cabinet. It also terminates the day prior to the date of expiration of the perpetuity period but the definition of "perpetuity period" in effect means that it is in existence for very many years to come.

(h) Distribution on dissolution is the subject of clause 118. On dissolution, the funds are paid in accordance with the Trust Deed to the contributors entitled to them less the expense of dissolution. Any surplus does not go to the Government of the Cook Islands. It may at the discretion of the Trustee be paid to members, former members or pensioners or other dependants by way of further benefits.

The Cook Islands Constitution

10. The Constitution is based on the Westminster Model, whose character was explained by the Board in *Hinds v The Queen* [1977] AC 195, 213-214.

11. Article 41(1) effectively entrenches the Constitution by requiring any legislation which amends the Constitution to "[receive] the affirmative votes of not less than two-thirds of the total membership (including vacancies) of the Parliament" and to satisfy certain other requirements. (Article 41(2) imposes an additional requirement for some categories of legislation which amend the Constitution, but it is not relevant for present purposes).

12. Article 40 is headed "No property to be taken compulsorily without compensation", and paragraph (1) is in these terms:

"No property shall be taken possession of compulsorily, and no right over or interest in any property shall be acquired compulsorily, except under the law, which of itself or when read with any other law -

(a) Requires the payment within a reasonable time of adequate compensation therefor; and

(b) Gives to any person claiming that compensation, a right of access, for the determination of his interest in the property and the amount of compensation, to the High Court; and

(c) Gives to any party to proceedings in the High Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that court sitting as a court of original jurisdiction."

13. Article 64 is headed "Fundamental human rights and freedoms". It provides as follows:

"(1) It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms -

(a) The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law;

(b) The right of the individual to equality before the law and to the protection of the law;

(c) The right of the individual to own property and the right not to be deprived thereof except in accordance with law: ...

(2) It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed, by any

> enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands."

14. Article 65 states that, subject to paragraph (2) of article 64, every enactment shall be construed and applied so as not to abrogate, abridge or infringe (or authorise the abrogation, abridgement or infringement) of any of the rights and freedoms mentioned in article 64(1).

The arguments raised before the Board

15. The appellants, some of whom are employers, and the rest of whom are employees, in businesses carried on in the Cook Islands, contend that the Scheme, as set up by the 2000 Act infringes the Constitution, and is therefore invalid. Their argument raises three main contentions.

16. The first contention is that the mandatory contributory nature of the Scheme, which requires employees to pay contributions, and thereby to be deprived of a proportion of their remuneration, without any realistic access to those contributions until retirement or death, is disproportionate, and therefore contrary to article 40(1) and/or article 64(1)(c) of the Constitution, given that there is (i) no Government guarantee or other underwriting of the Scheme ("a Guarantee"), (ii) no entrenchment of the Scheme constitutionally ("Entrenchment"), and (iii) no right to make early withdrawals for any reason (save under section 53, referred to in paras 5(k) above 18 below). This is essentially a proportionality attack: in the absence of a Guarantee and Entrenchment, it is said that the deprivation of property resulting from implementation of the Scheme is disproportionate. In this connection, the appellants contend that the Court of Appeal adopted the wrong approach to the question of proportionality, and that, if the right approach is adopted, the Scheme fails the proportionality test.

17. The Minister's case on this first contention is that the Court of Appeal applied the right test in relation to proportionality, but, whether or not it did, the Scheme as set up by the 2000 Act is proportionate despite the absence of a Guarantee, Entrenchment, or right of early withdrawal of which the appellants complain.

18. Secondly, and separately, the appellants argue that the 2000 Act infringes article 40(1) and/or article 64(1) of the Constitution by virtue of its treatment of migrant workers, in that section 53 (whose effect is summarised in para 5(k) above) effectively forces them to forfeit the value of half their investment in the Fund (namely the employer's contributions), or alternatively because they are deprived of interest on their contributions when they are repaid.

19. The Minister contends that, on analysis, section 53 of the 2000 Act infringes neither of the two articles of the Constitution.

20. In the courts below, various other points were taken, but those points are now abandoned and it is unnecessary to say more about them.

21. The Board will first consider whether the Scheme is disproportionate, and therefore unconstitutional, because of the absence of a Guarantee, Entrenchment, or right of early withdrawal; and it will then turn to the narrower issue of whether the Scheme is unconstitutional in the light of, and to the extent of, its treatment of migrant workers.

The constitutionality of the Scheme without Guarantee, Entrenchment or early withdrawal rights

Introductory

22. As explained above, the Scheme is said by the appellants to infringe article 40(1) and/or article 64(1)(c) of the Constitution on the grounds that it is disproportionate to deprive employees in the Cook Islands of a significant proportion of their wages, with no guaranteed return and no significant means of access until retirement, given that there is no Guarantee or Entrenchment, and no right of early withdrawal.

23. The Board does not accept that article 40(1) is engaged in this connection. There is no question of "property [being] taken … compulsorily", as contributions are not taken from an employee: rather they are invested for his or her benefit, albeit compulsorily and in a manner outside the employee's control. The fact that the fees and costs involved in administering the Scheme are taken from the aggregate contributions takes matters no further in this connection: it is an inevitable and plainly lawful incident of the existence of any superannuation scheme.

24. There is, at least on the face of it, a somewhat more credible case for saying that the compulsory investment in the Fund involves the compulsory acquisition by the Trustees of the Fund of a "right over or interest" in the contributions within article 40(1). However, all such contributions, and the resultant investments, remain vested in the employee who paid it (see paras 5(e)(ix) and 9(a)(i) and (ii) and 9(a) and (b) above), and the investments so vested will in due course be used for the benefit of the employee or his family. Accordingly, the Board rejects that contention also.

25. In relation to article 64, by contrast, the Board agrees with the courts below that the appellants are right to contend that article 64(1)(c), is engaged by the operation of the Scheme. The compulsory extraction of contributions from an employee's wages does represent a "deprivation" of those contributions, even though they (and any resulting investments) are held for the benefit of the employee, and the contributions (and investments) remain vested in him or her. This was rightly not disputed by the Minister, and it is therefore unnecessary to say more about it.

26. Accordingly the appellants' constitutional rights under article 64(1)(c) are engaged, and it is therefore necessary to address the contention that the Scheme is unconstitutional on the ground that the interference with employees' article 64(1)(c) rights is disproportionate, in the light of the absence of a Guarantee, Entrenchment or right of early withdrawal.

27. So far as the alleged lack of proportionality of the Scheme is concerned, both the Chief Justice and the Court of Appeal analysed the relevant evidence and law very fully and very carefully. Much of the argument before the Board involved the appellants and the Minister respectively attacking and defending the analysis conducted by the Court of Appeal. In that connection, the Board considers that there is force in the appellants' criticism that the Court of Appeal did apply the wrong test in two respects. First, it placed too much weight on the presumption of constitutionality. Secondly, it appears to have concluded that the question of proportionality in a case such as the present was substantially equivalent to "*Wednesbury* irrationality".

28. Accordingly, the Board will first discuss the presumption of constitutionality and the applicable approach to proportionality, and it will then consider the central issue, namely whether the Scheme is indeed disproportionate.

The presumption of constitutionality

29. So far as the presumption of constitutionality is concerned, the Court of Appeal said that it had two components. The first was the principle that a court should, if possible, interpret a statute so that it does not conflict with any constitutional limitations - see *Observer Publications Ltd v Matthew* [2001] UKPC 11, para 49. The second component which the Court of Appeal identified was that "[t]he constitutionality of a Parliamentary enactment is presumed unless it is shown to be unconstitutional" - see *Public Service Appeal Board v Omar Maraj* [2010] UKPC 29, para 29.

30. The Board has no doubt but that the first component is an important and valid principle of statutory interpretation, and indeed it is included in the Constitution - see article 65. As Lord Cooke said in *Observer Publications*, para 49, legislation should, if possible, be "read down" so as to comply with constitutional requirements. And, as

Lady Hale said more recently, "in interpreting [statutory] provisions, the Board should presume that Parliament intended to legislate for a purpose which is consistent with the fundamental rights and not in violation of them" - *Public Service Appeal Board v Omar Maraj* [2010] UKPC 29, para 29.

31. Greater circumspection is required when it comes to the second component. The Board would accept that, save perhaps in extreme circumstances, a statute should be presumed to be constitutional until it is shown to be otherwise, that (in so far as it is helpful to speak of a burden in such circumstances) the burden is on the party alleging that a statute is unconstitutional, and that any court should be circumspect before deciding that a statute is unconstitutional.

32. However, the Board is not convinced that the second component of the presumption can normally reach any further than this (unless it is no more than the proportionality exercise under a different name). It is true that there are cases where the Board described the burden on a party who alleges that a statute is unconstitutional as "heavy". However, where the issue is one of construction, that description is simply an application of the first, uncontroversial, component of the principle, as enunciated, for instance, by Lady Hale in *Omar Maraj*. And, in so far as the issue of constitutionality turns (as here) on proportionality, this second limb of the presumption normally adds nothing to the ingredients of the proportionality exercise. However, it is right to acknowledge that the notion that there is a heavy burden on a party who alleges a statute is unconstitutional has obvious force where the allegation of unconstitutionality turns on issues of fact - eg the motive of the legislator (as was discussed in *Hinds* at p 224).

33. In the present case, there is no significant issue of fact between the parties: the effect of the Scheme as set up by the 2000 Act is agreed, as is the fact that there is no Guarantee, Entrenchment or early withdrawal right The issue is simply whether the absence of each of those three features means that the Scheme is disproportionate thereby rendering the 2000 Act unconstitutional. In those circumstances, in agreement with the Chief Justice, the Board considers that the presumption of constitutionality takes matters no further, unless it is treated as an aspect of proportionality, in which case it adds nothing and, indeed, merely serves to confuse. In that connection, when considering the second component of the presumption of constitutionality, the Court of Appeal does appear at times to have conflated it with the margin of judgment which the court accords to the legislature when considering the proportionality of a statute. Thus, in paras 45 and 46 of their judgment, in support of what they had concluded in connection with the presumption of constitutionality, the Court of Appeal quoted passages from judgments in *La Compagnie Sucrière de Bel Ombre Ltee v Government of Mauritius* [1995] 3 LRC 494, 503 and *Grape Bay Ltd v Attorney General of Bermuda* [2000] 1 WLR 574, 585, both of which were expressly concerned with the "margin of appreciation" which the court should accord the legislature.

The proper approach to proportionality

34. So far as proportionality is concerned, the Court of Appeal rightly referred to the judgments of Lord Sumption and Lord Reed in the United Kingdom Supreme Court in the case of *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, paras 20-21 and 68-76 respectively. However (drawing from its earlier decision in *Clarke v Karika* [1985] LRC (Const) 732, 746), the Court of Appeal suggested at para 39 of its judgment that the 2000 Act could only be impugned on grounds of disproportionality if it "does not rest upon any reasonable basis, but is essentially arbitrary". The test of arbitrariness was also treated as the appropriate test in a passage in *Woods v Minister of Justice, Legal and Parliamentary Affairs* [1994] 1 LRC 359, 362 cited with approval by the Court of Appeal in para 49 of its judgment.

35. The Board considers that, in suggesting that the 2000 Act could only be declared unconstitutional on the grounds of disproportionality if it could be shown to be arbitrary, the Court of Appeal applied an inappropriate test. The test of arbitrariness may well be an appropriate way of testing the lawfulness of at least some ordinary administrative decisions and actions, applying the so-called *Wednesbury* test. However, the proportionality exercise is rather different, as indeed is clear from the two judgments in *Bank Mellat* referred to above.

36. Thus, in para 20 of his judgment, Lord Sumption explained that an issue of proportionality:

> "depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

37. As Lord Reed said in para 69 of his judgment in *Bank Mellat*, "the intensity [of a proportionality review] - that is to say, the degree of weight or respect given to the assessment of the primary decision-maker - depends on the context". Thus, the intensity of the review which the court carries out in a proportionality exercise depends on a number of factors, including in particular the right involved, the nature of the issue and the identity of the decision maker.

38. As to the nature of the issue involved in this case, the 2000 Act was a measure of social policy with significant macro-economic implications, and, particularly bearing in mind the specific criticisms advanced by the appellants, with considerable budgetary implications for the Government (which are anyway engaged, not least because of the tax foregone on contributions to the Scheme). Whether to introduce such a scheme, and, if so, what its general terms should be, and in particular whether they should include a Guarantee, Entrenchment and/or early withdrawal rights are, by their very nature, decisions as to which the courts should accord the Government a generous margin of judgment (or appreciation). When it comes to policy choices of a social and macro-economic nature, the courts should be particularly diffident about interfering, given the nature of the functions, expertise and experience of the judiciary as against the executive or (as in this case) the legislature - see eg *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6; [2015] PTSR 322, paras 22-23 and 61-65.

39. So far as the decision-maker is concerned, in this case it was Parliament. The legislature is entitled to a wider margin of judgment than the executive. Unlike a person exercising delegated powers, the legislature has a wider range of options open to it, and, as a result of being elected it, enjoys democratic legitimacy and has direct democratic accountability. Further, as a practical matter, it is, normally at any rate, difficult to identify the motives of a legislature, given that different members may have different reasons for voting the way they did, and, in relation to a number of Bills, many of the members who vote in favour do not speak.

40. The constitutional right raised in relation to this issue in the case is the right to property. While this is an important right, every interference with property rights must be assessed on its facts. In this case an employee loses control of the money which he contributes to the Fund, and there is a risk of its diminution or even its total loss. However, this is not a case of actual deprivation of money: it is more a case of enforced long term investment of money, albeit that the investment is one over which the owner of the money has not only no choice, but also very limited control, either over how the money is invested or when and how he or she can withdraw the eventual proceeds of the investment.

41. In these circumstances, this case is very much at the lower end of the intensity of review spectrum. The nature of the decision (particularly as the criticisms advanced by the appellants plainly have macro-economic implications), the identity of the decision-maker (the democratically elected legislature) and the nature of the interference with the constitutional right (which, while serious, is relatively mild) justify the argument that any court should be particularly diffident before acceding to the appellants' case on this first issue. While the Court of Appeal was wrong to conclude that arbitrariness was the hurdle which any proportionality challenge had to cross, it is fair to say that any challenge to the constitutionality of the 2000 Act on the grounds

alleged by the appellants faces an uphill task, and may not fall very far short of arbitrariness. However, as explained, arbitrariness is an unhelpful test in this context.

The alleged disproportionality of the Scheme: General

42. As explained in para 36 above, this question involves addressing four questions or requirements. It is rightly accepted by the appellants that the first and second requirements of the four stage proportionality test are satisfied. The objective of the 2000 Act and the Scheme is to relieve poverty in the Cook Islands by providing substantially greater financial security than previously existed for those who have ceased to be economically active. That is plainly an important, indeed a laudable, aim, and it is one which is plainly sufficiently important to justify the limitation of the fundamental right contained in article 64(1)(c). It is also indisputable that the 2000 Act (and the Trust Deed) are rationally connected to this objective.

43. It is argued on behalf of the appellants that their complaints about the lack of a Guarantee or Entrenchment comes in at either the third or the fourth of the four stages of the proportionality analysis. There is a potential degree of overlap between the two stages, and, at least in this case, there is no point in discussing which of the two stages is involved in the appellants' arguments. The Board will consider the argument on the basis that applies at both stages.

44. So far as it is contended that the Scheme fails on the ground that a less intrusive measure could have been used, it is true that it can be said that, if the Scheme had included a Guarantee and if it had been entrenched constitutionally, the deprivation which it involves would have been less "intrusive" than it actually is. However, when it comes to the third stage in the proportionality analysis, as Lord Reed explained in *Bank Mellat*, para 75:

> "the limitation of the protected right must be one that 'it was reasonable for the legislature to impose' and that the courts [are] 'not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line'. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: … a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down …; especially, … if he is unaware of the relevant practicalities and indifferent to considerations of cost."

45. As to the fourth stage, it involves the court asking whether a fair balance has been struck. In this case, that requires the court to ask whether the absence of a Guarantee and Entrenchment means that a fair balance, which would otherwise be accepted as having been achieved, has not been achieved.

The alleged disproportionality of the Scheme: a Guarantee

46. As it was developed by Dr McCoy on behalf of the appellants, the contention that the Scheme is disproportionate because of the absence of a Guarantee appeared to involve two points. The first was that a Guarantee would ensure that any defalcations in relation to the assets in the Fund should be made good by the Government. The second was that the Guarantee should not be limited to making good defalcations, but should effectively involve the Government underwriting a minimum return to members of the Scheme.

47. So far as the notion of a simple Guarantee to protect the members of the Scheme against defalcations is concerned, it appears to the Board to be hard to argue that the protection afforded under the terms of the 2000 Act and the Trust Deed (see in particular the terms summarised in paras 5(c), (f), (g) and (h) and 9(a)(ii) above) are insufficient. The protection afforded to Scheme members appears to be the sort of protection which is given in any well-drafted private superannuation scheme. Accordingly, at least on the face of it, the Board cannot perceive any justification for the argument that it was positively disproportionate for the Cook Islands' Parliament not to have included a simple government Guarantee to protect the members of the Scheme against defalcations.

48. Dr McCoy argued with some force that the prospect of the Cook Islands' Government seeking to take action which disadvantaged members of the Scheme was not fanciful. He said that "Governments [of the Cook Islands] in the past had repeatedly plundered public and Governmental funds" and that there had been "past rampant government maladministration" in the Cook Islands. In particular, he pointed to the fact that governments of the Cook Islands in the past had a "history of misappropriating any accessible source of funds including the assets of the Government's then superannuation scheme for public servants", which occurred in the 1990s. Sadly, there is undoubtedly force in that point, as can be appreciated by reading paras 140-147 of the Court of Appeal judgment in this case, as well as the judgments in *Malcolm v Tanga* [2006] NZAR 97 (CIHC) and *George v Attorney General* OA No 1/2013, 22 July 2013. Accordingly, Dr McCoy suggested that, even if a Guarantee would not otherwise be required to achieve proportionality, the unfortunate history of the Cook Islands indicated that it was required in this case.

49. It is obviously inimical to the rule of law for a court to refuse ever to contemplate the possibility that the executive, or even the legislature, may in the future act unlawfully or improperly. On the other hand, it is very difficult to see how there can be a coherent system of government and maintenance of the rule of law unless there is generally mutual respect and confidence between the legislature, the executive and the judiciary. The history of the governance and financial management of previous Cook Islands administrations does give cause for concern. But it does not appear to the Board that the unfortunate history upon which Dr McCoy understandably relies justifies concluding that proportionality requires a Guarantee, if (as the Board has concluded) it would otherwise not be required. As the Court of Appeal said in para 196 of its judgment, "for all its economic trials and tribulations, the Cook Islands has been, since Independence, a stable law-abiding democracy".

50. More specifically, as the Court of Appeal pointed out in para 198 of its judgment, the protection afforded under the Scheme (for instance through having an independent and respected trustee based in New Zealand, a Board only one of whose six members is appointed by the Government, and its assets vested in its members) is significantly greater, indeed of a wholly different order, from that which existed in relation to the scheme which was unlawfully plundered in the 1990s.

51. Furthermore, if the real threat to the safety of the investments in the Fund comes from the Government, it is hard to see how a guarantee from the Government would add much, if anything to the protection afforded to Scheme members.

52. It is true that (with one exception, where the scheme got into difficulties) in those other small Pacific Islands which have state-sponsored compulsory superannuation schemes are guaranteed by the relevant government. It is also true that that a World Bank Report (*Averting the Old Age Crisis: Policies to Protect the Old and Promote Growth*, 1994) supports the notion that superannuation schemes should be guaranteed in some way so as to ensure a minimum return for members. However, those points do not take matters much further, other than to emphasise that it is perfectly reasonable to contend that the Scheme should have such a guarantee; but that is not the issue.

53. The contention that the Government should guarantee a minimum return to Scheme members rests on the notion that compulsory use of 5% of an employee's earnings for saving for his or her retirement cannot be justified under a state-sponsored superannuation scheme if the employee is required to take the whole of the investment risk.

54. Whether or not there should be a sharing of the investment risk between employees and the Government, and, if so, how such sharing should be achieved, are essentially questions as to the allocation of risk between two groups of people, namely

members of the Scheme and Cook Islands' taxpayers. It appears to the Board that it would require an exceptional case before a court could properly hold that a legislative decision on such an issue could be rejected as being disproportionate. Self-evidently, it is very difficult for a judge, who has relatively limited relevant experience and appreciation of the competing demands on the nation's finances, to decide that the conclusion which the legislature reached on such a macro-economic, policy-based issue was unreasonable or disproportionate.

55. The nature of a defined contribution superannuation scheme is that the members' contributions are invested, and that the eventual retirement benefits are dependent, to a substantial extent, on how the investments perform. Unlike the traditional, but now very rare, defined benefit schemes, there is no guaranteed level of retirement benefit. The very fact that the cost of such a guarantee was becoming very high, in many peoples' view, prohibitively high, explains the almost universal closing of defined benefit schemes in much richer societies than that of the Cook Islands. It accordingly can be said with some force that, at least unless the level of guaranteed benefit is very low, the provision of a guarantee such as the appellants seek in this case would involve the Cook Islands' Government running a real risk of creating economic problems for the future.

56. Dr McCoy again relied on the recent unfortunate history of the Cook Islands, summarised in para 48 above, to support his case for a guaranteed minimum return. The Board has some difficulty in seeing any relevant connection. In any event, it can be said with some force that, if the previous financial problems in the Cook Islands are relevant, then, from the point of view of taxpayers, that represents a good reason for not entrenching the 2000 Act, and, even more powerfully, for not providing a Guarantee. If there is a risk of the financial difficulties recurring, that would suggest that the Government should avoid entering into any substantial commitment unless it has no alternative. This point ultimately simply serves to emphasise that the decision whether to provide a Guarantee involves balancing the competing interests of two substantial groups, Scheme members and taxpayers, and reaching what is very much a policy-based decision.

57. It is also true that some of the state-sponsored superannuation schemes in other small Pacific islands have a government guarantee of a minimum return to members. However, others do not. In any event, as explained in para 52 above, the point is of no real assistance to the appellants anyway.

58. In rejecting the appellants' case for a Guarantee, the Court of Appeal also relied on an actuarial report, which concluded that, over its 14 years of existence, the Fund had been financially successful, and assessed the chances of a cumulative loss over any five-year period as being 0.4%. In the Board's view, this was something which can properly be taken into account when assessing the appellants' claim that there should be a Guarantee.

The alleged disproportionality of the Scheme: Entrenchment

59. So far as Entrenchment is concerned, the appellants rightly accept that there is nothing in the Constitution which requires the 2000 Act to be constitutionally entrenched. The Court of Appeal rightly observed at [2014] CIKA 4, para 190 that it would be unusual to entrench constitutionally legislation which did not "creat[e] the constitutional structure of a state, especially to preserve the specific rights and freedoms deemed by its Parliament to be sacrosanct." This does not, of course mean that the appellants' argument on Entrenchment must fail, but, given that they are seeking to persuade a court that lack of Entrenchment undermines the lawfulness of the Scheme as set up by the 2000 Act, it serves to increase the pitch of the uphill slope that they have to climb.

60. However, as Dr McCoy put the point on behalf of the appellants "if the threat or risk of deprivation in the form of non-return or partial return [of employees' contributions] is put beyond easy reach by Entrenchment, then the degree of deprivation constituted by the initial capturing of compulsory contributions …, is correspondingly lessened." He makes the point that, in the absence of Entrenchment, legislation could, for instance, render the Fund taxable, increase the maximum proportion of the Fund to be invested in the Cook Islands, or increase the Government's regulatory control over the terms of the Trust Deed.

61. Nonetheless, there is, as already mentioned, substantial protection afforded to Scheme members. All the assets in the Fund are held in the name of an independent trustee, albeit subject to the limited powers of guidance which are conferred on the Board (see para 5(f) and (g) above). In addition, the trustee is based in New Zealand, and is highly reputable. Further, there is only one representative of the Minister, and no other Government representative on the Board (see para 5(c) and (d) above). In addition, the beneficial ownership in the assets acquired with an employee's contributions are beneficially vested in the employee (see para 9(a) above). Accordingly, as the Court of Appeal rightly pointed out in para 199 of its judgment, the Government cannot decide to acquire control or ownership over any of the assets in the Fund without giving rise to a potential claim under article 40 or article 64 of the Constitution, and thereby ensuring judicial scrutiny of any such decision. In other words, any action by the Government which involved an infringement of article 40 or article 64 rights would be unconstitutional, and, to that extent, Entrenchment would take matters no further. In other words, the Scheme is in practice constitutionally entrenched, or at least constitutionally protected, to a significant extent.

62. Having said that, it is plain that Entrenchment would give a degree of extra protection to those who have made contributions to the Fund. To that extent, the Board cannot agree with the Court of Appeal when it said in para 201 of its judgment that it did "not consider that entrenchment of the Act would have produced a less intrusive

deprivation" (although the Court made a fair point at para 200 when it suggested that Entrenchment could render it much more difficult to make beneficial changes to the Scheme). However, it remains the fact that it would not be a very substantial advance on the constitutional protection that such persons already enjoy under the Scheme. Quite apart from this, although the implementation of the Scheme does involve a deprivation of the contributions within the meaning of article 64(1)(c) of the Constitution, there is nothing expropriatory about the Scheme, which also weakens the case for Entrenchment.

63. In support of his argument in support of Entrenchment, Dr McCoy again relied on the history summarised in para 48 above. The Board does not consider that this factor can alter the conclusion that the lack of Entrenchment does not render the Scheme disproportionate for the reasons given in paras 50 and 51, and to a lesser extent para 52, above.

The alleged disproportionality of the Scheme: Early withdrawal

64. In addition to relying on the absence of a Guarantee and of Entrenchment, the appellants say that the Scheme is disproportionate because of its inflexibility, in that its terms do not permit members to access the funds vested in their names prior to retirement for purposes such as education or housing.

65. The Board has little hesitation in agreeing with the Court of Appeal that this line of attack on the proportionality of the Scheme must fail. It is hard to see how it can convincingly be contended to be inappropriate for a superannuation scheme to include terms which protect a member's capital from being spent in the meantime, even for worthwhile purposes, so as to ensure that it is available to fund his or her needs in retirement. Indeed, such a contention appears to lie rather uneasily with some of the arguments raised by the appellants on the need for a Guarantee of a minimum return, which is based on the notion that employees in the Cook Islands should have a reasonably sized pension.

66. Whether to include terms in the Scheme which permit early withdrawal, and the contents of any such terms, are issues which involve policy choices which were very much for the legislature as the decider of policy. At least in the absence of any good reason to the contrary, the Board sees no grounds for a court questioning the legislature's decision that the Scheme should include no such rights.

Conclusion on the first issue

67. In conclusion on this first issue, while the Scheme could undoubtedly benefit from serious reconsideration so far as some of its provisions are concerned (as the Court of Appeal rightly recognised - see [2014] CKCA 4, para 217), the Board does not consider that the absence of a Guarantee, Entrenchment or right of early withdrawal renders it unconstitutional. The terms of the 2000 Act and the Trust Deed, as summarised in paras 5 and 9 above, ensure that the Scheme is sufficiently secure and sufficiently independent of Government interference to avoid the need for a Guarantee or for Entrenchment. Of course, no system can be devised to ensure that anyone's money is completely safe from being lost or wrongly taken, but the terms of the 2000 Act (and the Trust Deed) provide sufficient protection of the rights of the Scheme members to ensure the Scheme's constitutionality.

The constitutionality of the treatment of migrant workers

68. The Board turns to the appellants' challenge to the constitutionality of the treatment under section 53 of the 2000 Act of employees who are not permanent residents in the Cook Islands. It is convenient at this point to set out the relevant part of the 2000 Act containing section 53. It is headed "Preservation of rights" and consists of two sections, reading as follows:

> "53. **Withdrawal** – (1) Subject to the provisions of this Act and the provisions of the Trust Deed not inconsistent with this Act, a contributor shall not be entitled to withdraw any amount to that person's credit in the Fund.
>
> (2) Where a person is resident in the Cook Islands for the sole purpose of being employed under a contract of service of not more than three years and all of that persons employee contributions for the time being to the credit of that person were made in respect of earnings paid under that contract of service then that person shall be entitled to receive a refund equal to the aggregate of those employee contributions on the persons permanent departure from the Cook Islands, subject to the provision of such evidence as the Board may require that the persons departure will be permanent.
>
> (3) Where a person is paid his or her employees contributions under subsection (2) then, the employers

contributions shall be transferred to the reserve account within Fund.

54. **Preservation of right** - Except as otherwise provided, where at any time a person ceases contributing to the Fund, the amount to the credit of that person shall continue to attract interest until it is applied to provide a benefit from the Fund."

69. In summary, as set out also in para 5(k) above, non-resident employees ("migrant workers") who are employed for up to three years have to contribute to the Scheme in the same way as employees who are permanently resident in the Cook Islands ("resident workers"). However, unlike resident workers, migrant workers are entitled (but not obliged) to be repaid their contributions at the end of their employment, but this right only extends to their own contributions, and not to the contributions made for their benefit by their employers. In the event of a migrant employee making such an election, the employer's contributions are transferred to the Fund's reserve account (as to which see para 9(c) above). There, they inure to the benefit of other members of the superannuation fund (in practice, mainly Cook Islanders) and/or to the Cook Islands government which has in practice largely underwritten the fund's expenses.

70. The factual background to this issue is set out in an affidavit from the Executive Director and an executive member (and past President) of the Cook Islands Chamber of Commerce (Lynnette Margaret Samuela and Stephen Nigel Anderson). In their affidavit, they made clear that, while they did not support the challenge based on the arguments considered in paras 22-67 above, they took issue with the fairness of and justification for the provisions of section 53. Their affidavit describes the development over the years of extensive dependence of Cook Islands' hotel and tourism businesses on migrant workers, the bulk of whom come from countries such as Fiji, the Philippines, Indonesia, Kiribati and are driven to work in the Cook Islands by economic pressures. It notes that migrant workers are "often only semi-skilled" and in general modestly paid; that it is Cook Islands policy to discourage migrant workers from long term residence (with section 17 of the Entry, Residence and Departure Act 1971-72 thus providing for every entry permit to expire after two or less years); and that many migrant workers aim to return home after maximising remittances while in the Cook Islands. The affidavit describes the limited portability of superannuation for foreign workers as "very unsatisfactory" and "the nett effect of the Act [as] constitut[ing] a 'tax' that falls disproportionately on these lower paid workers in a way that seems discriminatory".

71. As a matter of law, the appellant's challenge to section 53 in its present form can be analysed as raising two complaints. The first complaint is that section 53 involves unjustifiable discrimination against migrant workers, contrary to article 64(1) of the Constitution, because they are required to forego the benefit of their employer's contributions. The second complaint is that, because the section requires migrant

workers to forego the benefit of their employer's contributions (which are vested in them), they are deprived of property without justification or compensation, contrary to article 40(1) and/or article 64(1)(c) of the Constitution (set out in paras 12 and 13 above). The Board considers it convenient to address these complaints together. There is no challenge to the finding by the Court of Appeal of deprivation of the claimants' property within the meaning of article 64(1)(c) and the critical question is whether there is unjustifiable discrimination.

72. Under the 2000 Act, migrant workers become members of the Fund, and contributions have to be made in respect of them, in the same way as is the case with any Cook Islands' inhabitant. Under the 2000 Act and the Trust Deed, all contributions made in respect of and standing to the account of a particular employee are "fully vested" in that employee: see para 9(a)(ii) above. The employee earns the employers' contributions by the work he does, just as he earns the benefit of his own contributions by deductions from the pay which he would otherwise receive for the same work. Migrants and ordinary inhabitants are to that extent in identical positions. But their position in practical terms is significantly different. Migrants are not expected to remain in the Islands or to live there during their retirement. It is not in their, or probably anyone's, interests that they should be locked into a Cook Islands' pension scheme until their retirement. After migrants leave the Islands, the prospects of their claiming any limited pension which they had earned there, perhaps decades earlier, are inevitably slight.

73. The Court of Appeal in para 9 of their judgment accurately described the Fund as "aimed at providing financial security for Cook Islanders in their retirement", and in para 12 they quoted the Deputy Prime Minister as saying at the second reading of the Bill which became the Act that "the purpose of the Bill is to establish a compulsory National Superannuation Fund from which benefits are to be provided to employees upon their retirement from employment in the Cook Islands". This was in the long term interests of the Islanders as individuals and of the Cook Islands' community, which would otherwise face the problem of what to do about an elderly and in some cases indigent section of the community. This aim provided the rationale for two essential features of the Fund, namely that it was compulsory and that the ability of individuals to draw benefits before retirement was severely restricted. However, for reasons which the Board has set out, migrant workers are a distinct social group to whom that rationale does not apply. They are not Cook Islanders and are not expected to live in the Cook Islands until retirement. On the contrary, they fulfil a particular purpose for the Islands' economy by being admitted for a short term only.

74. Two decisions of the Grand Chamber of the European Court of Human Rights establish that "[t]he right not to be discriminated against … is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different", and that discrimination can "take the form of disproportionately prejudicial effects of a general policy or measure which, though

couched in neutral terms, discriminates against a group": see *Thlimmenos v Greece* (2000) 31 EHRR 15, para 44 and *DH v Czech Republic* (2007) 47 EHRR 3, para 184 respectively. It is therefore in the Board's view no answer to say that there has been no discrimination because there would have been none if section 53 had not been enacted (since the treatment of migrant workers would have been identical to that of indigenous workers); and that far from section 53 being open to objection, it merely gives to migrant workers an extra choice and therefore a more privileged position. If section 53 had not been enacted, migrant workers would have been admitted to the Islands on a purely temporary basis and compelled to contribute to the Fund, but not allowed to remove what they had earned on their permanent departure from the Islands. This would in the Board's view have been a good example of a disproportionately prejudicial effect of a general measure on a distinctly different group from those, ie indigenous workers, whose welfare in retirement constituted the aim behind the establishment of the Fund.

75. In these circumstances, the Cook Islands legislature in enacting the Scheme has recognised that fairness requires that special provision be made for the special position of migrant workers. However, having recognised that the position of migrants cannot sensibly be equated with that of ordinary inhabitants, the Cook Islands legislature has, as the Board sees it, gone only half way in section 53 towards compensating for the difference. It entitles migrants to the return of half their interest in the Fund, while in effect giving the benefit of the other half of the migrants' interest in the Fund to the Fund and/or other pension-right holders and/or (because the evidence is that the government has largely been funding the expenses of the Fund) to the benefit of the Cook Islands' Government itself. Section 53 has left migrants with a choice between (a) a (little more than theoretical) right to claim a pension on the same basis as an ordinary inhabitant at a date which is likely to be years or decades in the future and (b) a (practical) right to return (without interest, though no specific complaint is made about this) of only half the pension contributions standing to their credit in the Fund on leaving the Cook Islands after two years.

76. The fact that it is fairly standard for any pension scheme which entitles a member to withdraw his funds from the scheme early, to contain a provision which penalises him for doing so, is, in the Board's view, no answer to this. One is here concerned with a specific group of people who are required to be members of a scheme, and who either can be seen as people who ought not to have been required to be members, or who, by their circumstances, will be almost bound to wish to withdraw their funds early. That point is reinforced by the fact that, in this case, it is only migrant workers who are entitled to withdraw from the Scheme.

77. Section 53, by excluding the portability of the contributions originating with the employer treats the employee as if he had not earned these contributions and as if they were not vested in him. It recognises that in fairness, the employee should not be deprived of accrued pension rights, but it fails to appreciate that these extend as much to the sums directly contributed by the employer (but earned by the employee) as to the

sums directly contributed by the migrant employee. All the contributions, from whatever source, are in employment terms earned by, and in Trust Fund terms "fully vested" in, the relevant migrant workers.

78. The upshot of section 53 is, in practice, that advantage is taken of migrant workers' vested pension contributions to the benefit of the reserve fund, and so to the benefit either of the body of Cook Islands' workers or of the Fund or the Cook Islands' Government. Migrant workers are necessary for the Cook Islands' economy, but they are not welcome for too long (hence the two-year entry permit limit). They are accepted as requiring special treatment in view of their special position. But the treatment offered (which they will and do in practice accept) treats them in effect as a class of worker who can be expected to work for less than the wages which Cook Islands' inhabitants receive. On this basis, if it extended generally, a migrant worker working in various host countries for periods of two years throughout his life, would, for precisely the same work as the inhabitants of such countries, lose the benefit of in effect 5% (assuming para 5(b) above to reflect present Cook Islands' contribution rates) of the equivalent of his or her total income over his or her working life, compared with such inhabitants. According to the evidence of Mr Wilkie Rasmussen, leader of the Opposition in the Cook Islands, the position differs in other Pacific countries, such as Samoa, Tonga, Fiji, the Solomon Islands, Tuvalu and Vanuatu. They are said to allow migrants who permanently depart a full return of pension contributions standing to their credit. That suggests that section 53 is internationally anomalous in practice.

79. This suggestion is supported by the fact that there do appear to be international standards which recognise and contain recommendations which address the problem of migrants' social benefits. The Secretary-General of the United Nations, in his report to the General Assembly dated 18 May 2006 on international migration and development including benefits and the protection of migrants, A/60/871, para 98, addressed the need to enhance the portability of pensions by collaboration between countries of origin and destination, and continued:

> "Best practices in this area include allowing the totalization of periods of contribution and ensuring that migrants receive a fair replacement rate from each of the pension systems to which they contributed."

In paras 76 and 113 of a later report dated 25 July 2013, A/68/190, the Secretary-General again referred to the need to enhance the portability of social security and other acquired right for migrants.

80. The International Covenant on Economic, Social and Cultural Rights of 16 December 1966, records (in article 9 read with article 2(2)) the undertaking of states to

guarantee the rights of everyone to social security without discrimination. The United Nations' Economic and Social Council's ("ECOSOC's") General Comment No 19 dated 4 February 2008 on article 9 explains that this means that

> "Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country."

A footnote in this connection refers to para 98 of the Secretary-General's report A/60/871. It should perhaps be added that there is no justification for treating the reference to migrants receiving "their contributions if they leave the country" as contemplating so discriminatory a result as would obtain if it was taken as excluding employer's accrued contributions.

81. In the Board's view, the limitation of recovery under section 53 is both anomalous and unfair. This is a view which appears in large measure to have been shared by the courts below - both consisting of judges closer to the Cook Islands and particularly well placed to make a judgment on such matters. At first instance, Weston CJ, correctly in the Board's view, saw section 53 as recognising that it would not be fair to lock departing migrants in (para 217), and went on:

> "But it is by no means clear to me why migrant workers should lose their employer contributions in those circumstances. Whatever the reason, dispossessing migrant workers of their employer contributions seems both unnecessary and unfair."

82. The Court of Appeal (Williams P, Barker and Paterson JJA) referred to the "rather anomalous position of migrant workers not being allowed to access the employer's contribution" as "one of the 'strands in the rope'" (para 204). However, their judgment went on (para 205) to reject the challenge to section 53, for reasons which the Board cannot accept, namely because they thought that

> "A citizen, not a migrant worker leaving the Cook Islands, is not entitled to withdraw contributions which are locked in until the age of retirement. Whatever the court may think of the fairness of such proposal [sic] it was well within the legislature's power to legislate on such matters of social policy."

It is not entirely clear what the "proposal" in question here was, but it was probably the submission that migrants should have been entitled to withdraw the whole of their

contributions. On that basis, the comparison drawn with ordinary inhabitants simply ignores the differences between their positions, which section 53 aims but fails fully to address and redress.

83. The Court of Appeal went on to refer to *Pillai v Mudanayake* [1953] AC 514 as a case where the Board held that "alleged discrimination against immigrants, namely Indian Tamils, was intra vires the Ceylon Legislature because it was based not on their nationality but on their migratory habits". This case has however no relevance at all to the present. It was concerned with primitive anti-discrimination legislation - the Ceylon (Constitution and Independence) Order in Council, 1946 as amended - which only precluded the imposition of "disabilities or restrictions to which persons of other communities … are not made liable", and all that it decided was that migrants were not a "community" under this Act and so not then protected from discrimination.

84. The Court of Appeal next quoted a prior Cook Islands' Court of Appeal decision, *Clarke v Karika* [1985] LRC (Const) 732, as authority for the proposition that the constitutional right to equal treatment or non-discrimination was "offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's purpose". If that was ever the law in the Cook Islands, the Board considers that it certainly cannot be now. It represents a quite inadequate approach to the "exacting analysis" and determination required by the passage in *Bank Mellat* set out in para 36 above.

85. The Board is also unable to accept the Court of Appeal's next paragraph in which it sought to rationalise its approach and conclusions, as follows (para 207):

> "There is a legitimate purpose to the challenged provisions regarding migratory workers because they act as disincentive to people migrating and depopulating the Cook Islands."

This suggestion appears to the Board both speculative and implausible. The only evidence that the Court of Appeal referred to in this part of its judgment was that (adduced by the appellants) of Mr Trevor Clarke, Chairman and Chief Executive of Cook Islands' Trading Corporation. His view was that the 2000 Act "appears to abuse the rights of outward emigrants, of contract workers, and of employers". As to the relationship between emigration and immigration, he explained that outward immigration - meaning in context, clearly, of the indigenous population - was massively high, and that this had led to "increasing inward migration, on a short term basis, of workers from overseas". The problem of indigenous emigration has in short nothing to do with section 53.

86. Not surprisingly, in these circumstances, there is no support for the Court of Appeal's approach in the respondents' written case before the Board. The nearest this comes to any similar point is an unsupported speculation that

> "the legislature may, rightly or wrongly, have thought that the return to the employer of the employer's contribution could act as an incentive to structure the workforce with short term contracts so as to recover contributions, thereby diminishing the overall strength of the scheme, and horizontal equity between employers."

This is however addressing a hypothesis that section 53 might have provided for return of the employers' contribution in respect of any departing migrant to the employer. That would certainly give the employer an incentive to employ short term migrant labour, and would be just as unfair to migrant workers as the present system. It offers no justification for depriving departing migrant workers of the value of such contributions. They are a much needed part of the workforce, but have to leave after at most two years.

87. In the above circumstances, it is for the Board, in its role as a constitutional court, to evaluate the constitutionality of section 53, applying the approach indicated in *Bank Mellat* so far as that raises issues of proportionality, and bearing in mind that the Scheme as a whole falls within the area of social policy. In contrast to the position under the general challenge to constitutionality which the Board has rejected, the Board is here concerned with a specific provision, bearing on the position, and vested rights, of a specific (and socially disadvantaged) category of pension-right holders, migrants. That there is a valid and necessary objective behind a provision enabling migrant workers, who are only permitted to stay for a short period of years, to recover (albeit without interest) pension contributions vested in them is unquestionable. But the objective in excluding from such recovery the equivalent of employers' contributions is unexplained, save that it will obviously benefit other ordinary pension-fund holders, the Fund and/or the Cook Islands' Government. No substantial justification at all has been shown for such an exclusion. It is not, and could hardly be, suggested that the viability of the Scheme depended on it. The Scheme as a whole could, so far as appears, have operated by enabling migrants to recoup (without interest) the full value of the contributions vested in them. The benefit which section 53 in its present form gives to ordinary pension-right holders and/or the Cook Islands' Government was and is uncovenanted. It failed to strike a fair balance between migrants and the Cook Islands' community, and was disproportionate, to vest in the benefit of the employers' contributions made in respect of migrants leaving the Cook Islands and wishing to take with them their accrued pension rights.

88. No doubt it is true that schemes such as the present are primarily intended to be long term, and it may be regarded as generally undesirable to allow any contributions to be repaid before the long term picture of the development of a Fund such as the

present has emerged. But migrants in the Cook Islands are in a special position, where they are not only needed in the Cook Islands' economy, but are also required to participate, and so acquire vested interests, in the Fund, while at the same time being expected and required to stay only short term. Section 53 recognises their special position, but only partially. Its effect in its present form is, the Board concludes, both confiscatory, in that it deprives migrants of vested rights without justification, and discriminatory, in that it fails to make appropriate adjustments to cater for their special circumstances and needs.

89. It is true that it is a standard feature of pensions schemes that the interest of different groups may have to be balanced, but, in the Board's view, that generalisation does not exclude the need to consider what balancing (or other) factor may reasonably be considered to justify forfeiting part of a migrant worker's earnings accrued in the Fund on his permanent departure. None has been articulated and the Board can see none.

90. It is also true that the Act had democratic and bipartisan approval. However, that is self-evidently insufficient on its own to render a provision constitutional, although it is a factor which may have weight, particularly in cases which are near the margin. One of the principal reasons for having constitutional rights is that the ordinary majoritarian political process cannot necessarily be relied on to protect minorities. In the Board's view, for the reasons already given, the fact that the discriminatory provision has democratic support is not enough to justify its constitutionality. It is also perhaps worth pointing out that a migrant worker would not be part of the electorate unless he was a Commonwealth citizen or a permanent resident of the Cook Islands (article 28(1)(a) of the Constitution). Migrant workers are plainly not permanent residents, and the Board has no information what proportion of them are likely to be Commonwealth citizens (although such evidence as there is as to their origins suggests that the great majority would not be).

91. For these reasons, the Board is of the view that section 53 is unjustifiable in its present form, on the grounds that it unjustifiably deprives migrant workers of their property consisting of the employer contributions standing to their credit and unjustifiably discriminates against them. The Board accordingly proposes to declare that section 53(2) of the 2000 Act (set out in para 68 above) should be read and applied as if the word "employee" was struck out in each of the two places where it appears before the word "contributions" and that section 53(3) should be treated as deleted, but it will allow the parties 28 days after this judgment is handed down in which to make written submissions if they so wish about the terms of declaratory relief.

Conclusion

92. The appeal therefore fails on the first ground relating to the overall constitutionality of the Scheme as a whole, but succeeds on the second ground relating to section 53. The Board will humbly advise Her Majesty accordingly to dismiss this appeal in respect of the first ground and to allow it on the second ground by making a declaration in the terms proposed in the immediately preceding paragraph or such other terms as the Board may determine in the light of any submissions thereunder.

93. The parties are requested to make submissions in writing as to the terms of any order including costs, such submissions to be lodged with the Registrar (and simultaneously served on the other party) 28 days after this judgment is handed down.

LORD SUMPTION: (dissenting in part)

94. I agree with the advice which the majority proposes to tender to Her Majesty, except on one point, which relates to the treatment of migrant workers in section 53 of the Act. We are not on this appeal concerned with the wisdom of the policy underlying section 53. Nor are we concerned to ask what is the best kind of pension scheme for a community like the Cook Islands, or how treatment of migrant workers under this pension scheme compares with their treatment under other schemes enacted in supposedly comparable communities. The only question before us is its constitutional validity.

95. Modern states commonly legislate to compel those within their jurisdiction to spend their money or apply their other property to purposes which are conceived to be in the broader interests of the community. The social and financial problems associated with rising life expectancy have led many states to adopt compulsory savings schemes of one sort or another. These are generally very long term schemes covering an employed community comprising very diverse groups with different and sometimes inconsistent interests. In the nature of things they may have features that incidentally favour some groups more than others. They may favour long term members over early leavers, younger age groups over older ones, residents over non-residents, high taxpayers over low taxpayers, and so on. The design of a major pension scheme commonly requires difficult choices to be made. I do not doubt that a sufficiently gross measure of unfairness in the making of those choices might properly be struck down as unconstitutional. But within broad limits, the way in which different societies resolve such dilemmas involves legitimate policy choices.

96. The starting point is that from the time that the employee's and employer's contributions are credited to the fund, they are held in trust for the employee. He therefore has an equitable interest in the fund, so far as it represents contributions from

either source, albeit that in the case of migrant workers that interest is partially defeasible in the event that he leaves the territory and elects to take his contributions out. It is partially defeasible because if he elects to do that he will recover only his own contributions. He will lose the benefit of the employer's contributions and of any return that may have been made on the investment fund while he was a member. The appellants object to this on two grounds which, although elided in argument and in the majority's analysis, are actually distinct. The first is that it is discriminatory, and the second that it is confiscatory. Different considerations apply to these two objections.

97. In my opinion the treatment of migrant workers who elect to take out their contributions on leaving the territory is not discriminatory. Migrant workers have all the same rights as denizens, namely the right to a pension derived from both employer and employee contributions. The only difference is that they have an additional right, namely a right of early withdrawal, which denizens do not have. It is entirely up to them to decide whether to exercise that right. To that extent, they are treated more favourably than denizens. The only basis on which this could be said to discriminate against migrant workers is that their different situation required them to be treated more favourably still, by being allowed to take out their entire fund when they leave the islands. The difficulty about this argument is that it proves too much. If it is correct, then the Act would be discriminatory even if section 53 had been omitted, and migrant workers had been required to take a pension deferred to retirement like everybody else. So, implicit in the majority's advice is the proposition that it is unconstitutional not to have a special category of migrant workers entitled to withdraw their entire share of the fund when they leave. The basis of this proposition is that it is unreasonable to expect a migrant worker to accept a deferred pension at retirement age. This seems to me to be a surprising suggestion. Deferred pensions are a standard feature of occupational pension schemes whether private or state-sponsored. Before the introduction by statute of portable pensions in the United Kingdom, deferred pensions were routine, and in effect mandated by statute because it was a condition of Inland Revenue recognition of an occupational pension scheme that its terms prevented the taking of benefits before a minimum stipulated retirement age. So far as this is a problem, it would be mitigated if the pension was portable. But even portable pensions are deferred. Objectively, deferral has substantial advantages for the employee, including professional investment and a measure of protection against short term fluctuations in returns affecting the value of the pensioner's fund at pension age. It is suggested that, reasonable or not, in practice migrant workers will not wait until pensionable age to claim their entitlement. In fact, we have no idea whether this is so or not. There is not a shred of evidence on the point.

98. Turning to the other objection to section 53, I agree that the loss upon early withdrawal of the portion of the notional fund representing the employer's contributions is confiscatory. But I think that this was legitimate even if it was not admirable. The employer's contributions are earned by the migrant's services during the period of his employment. But what is earned is a contribution to the fund on the basis that the employee will receive its value in the form of a pension at pensionable age. This is the very thing that the employee renounces by leaving early. It would have been entirely in

accord with the Constitution for migrant workers to be exempted from the obligation to participate in the scheme. The reality is that the migrant worker who elects to leave the scheme is put back in the same position as if he had never been required to join. He will be paid a sum which reverses the interference with his property rights arising from his having been required to spend 5% of his income on pension provision. Subject to the performance of the fund (which is a different issue), he is no worse off than if his 5% had never been taken.

99. No separate complaint is made about the fact that a migrant worker withdrawing his contributions receives them without interest of a proportionate share of any return made on the fund. Nor could it have been. Over a period as short as three years, the fund may have achieved positive or negative returns. The migrant who withdraws his contributions on leaving does not share in any positive return, but neither will he suffer from negative returns. This aspect of the scheme is well within the range of policy solutions which could reasonably be adopted in the interests of the entire community of participants, including the migrant workers themselves.

100. None of this is affected by the relevant international obligations of the Cook Islands. The International Covenant on Economic, Social and Cultural Rights of 16 December 1966 is not part of the municipal law of the Cook Islands. Moreover, article 2(3) of the Convention specifically reserves the right of developing countries, "with due regard to human rights and their national economy", to determine the extent to which they will apply the social or economic rights recognised by the Convention to non-nationals. The official commentary observes (para 36) that non-nationals should nevertheless be entitled to benefit from their own contributions, which is exactly what section 53 provides for.

101. This appeal is concerned with the policy choices made on a major issue of domestic social policy with important budgetary implications. The Cook Islands are a very small community with limited resources, which has enacted these provisions after careful consideration and with democratic and bipartisan approval. I can see why even short term migrants should be entitled on leaving the scheme to recover the value of their own contributions, but I am not prepared to say that it is unconstitutional to limit their rights to that, especially when they have the option of taking a deferred pension on the same basis as everyone else.